No. 93-1583

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Supreme Court of the United States

OCTOBER TERM, 1993

TEXAS COMMERCE BANCSHARES, INC.,

Petitioner,

—v.—

STANLEY M. GROSSMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner Texas Commerce Bancshares, Inc. ("TCB") respectfully submits this reply brief in support of its petition for a writ of certiorari.[1]

The brief in opposition to TCB's petition filed by Respondent Stanley M. Grossman ("Grossman") fails to rebut TCB's showing that a district court's order reinstating a case previously dismissed with prejudice is subject to immediate appeal under this Court's collateral order doctrine precedents. Similarly, Grossman fails to address TCB's showing that by granting the petition and deciding this case in conjunction with *Desktop Direct, Inc. v. Digital Equipment Corp.*, 992

[1] The statement required by S. Ct. Rule 29.1 appears at Pet. ii.

F.2d 755 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 379 (1994) (argued Feb. 22, 1994), this Court will be able to define precisely the scope of the collateral order doctrine in these circumstances, an issue as to which the courts of appeals need guidance.

1. Instead of confronting the merits of TCB's petition Grossman mischaracterizes it. Grossman argues that the collateral order doctrine is inapplicable since the language of Section 27A of the Securities Exchange Act does not confer on TCB a right not to be tried. Respondent's Brief in Opposition ("Br. Opp.") at 8. This is true but irrelevant, since the issue presented by TCB's petition is wholly independent of Section 27A.

Contrary to Grossman's assertion, the question presented by TCB's petition is whether a decision of a district court rescinding a previous order of dismissal with prejudice is subject to immediate review, where the previous dismissal rendered the claim *res judicata* and the rescission of that order, if wrong, threatens to destroy—irreversibly absent immediate review—the defendant's right not to have to litigate the claim again. Here, the right not to be tried comes not from the District Court's reinstatement order under Section 27A of December 22, 1993, Texas Commerce Bancshares, Inc.'s Petition for a Writ of Certiorari ("Pet.") at 5a, but rather from the District Court's previous order of September 23, 1991, Pet. at 2a, dismissing the claim on the merits, with prejudice, and rendering the claim *res judicata*. The right to immediate appeal is implicated by this case as well as any other case in which a reinstatement order follows a dismissal on the merits with prejudice.[2]

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[2] Grossman's argument that TCB's petition fails to present an important issue since the number of cases under Section 27A is limited and diminishing, Br. Opp. at 8, is the exact opposite of his argument to the United States Court of Appeals for the Second Circuit. There Grossman expressed the fear that a decision in TCB's favor would open the floodgates and allow an ever expanding number of decisions to be

2. Grossman further mischaracterizes the issue by arguing that TCB's claim to immediate review is "no different" than that of any defendant whose motion to dismiss has been rejected before trial by the trial court. Br. Opp. at 14. Yet TCB's right to immediate appeal arises precisely because the District Court granted its motion to dismiss in its September 23, 1991 order, not because the District Court rejected it. Thus Grossman's description of TCB's procedural posture is incorrect. It is also untrue that TCB's asserted right to avoid trial is premised on a statute of limitations defense. The right to immediate review derives from the principles of *res judicata*, created when the District Court accepted TCB's argument and dismissed Grossman's claim against it. The nature of the defense found meritorious by the District Court is beside the point for this purpose; TCB's petition does not assert that a court's denial of a dismissal motion based on a limitations defense should be immediately appealable.[3]

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appealed under the collateral order doctrine. Neither of Grossman's contradictory contentions is correct, as noted in TCB's petition at page 15.

[3] Grossman also argues that the District Court's September 23 dismissal order was conditional and therefore not appealable. Br. Opp. at 5 n.13-14, 11 n.27. This contention is misplaced. First, the order of dismissal with prejudice was not subject to a condition precedent, and its provision authorizing reinstatement if the pending appeal in the Second Circuit in *Welch v. Cadre Capital*, 946 F.2d 185 (2d Cir. 1991), was determined against TCB's position was mooted when *Welch* was decided in TCB's favor. *See* Pet. at 5. These circumstances are in direct contrast to the case cited by Respondent, *Johann Maria Farina Gegenuber Dem Neumarkt v. Roger & Gallet*, 296 F.2d 119 (2d Cir. 1961), in which there was a condition precedent to the dismissal order which was not fulfilled.

Second, the appealability of the District Court's September 23 order is irrelevant, since it does not impact its *res judicata* effect. TCB's decision was final for *res judicata* purposes notwithstanding the absence of entry of a separate Rule 58 judgment as noted in *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) ("[N]ot all judgments that are final for purposes of *res judicata* are final for Fifth Amendment and separation of powers purposes."). Pet. at 12 n.4; Br. Opp at 6. Because the dismissal with prejudice was final for purposes of *res*

3. Grossman fails to rebut TCB's showing that its petition should be granted to clarify the present uncertainty in the circuits on the scope of the collateral order doctrine. Grossman observes that neither *Desktop Direct* nor *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990), are "related in any way to a determination under Securities Exchange Act § 27A of the appropriate limitations period to be applied. . . ." Br. Opp. at 13. Yet that contention necessarily relies on the misperception that this petition turns on Section 27A.

Grossman also points to a purported inconsistency in TCB's argument that it is both similar and distinct from *Desktop*. No such inconsistency exists. TCB is similar to *Desktop* in that both involve a defendant's right not to endure the vexatiousness of further litigation where previous circumstances had disposed of the claim against it. TCB is distinct from *Desktop* because its right not to go to trial results from a clear exercise of judicial power rather than the operation of a disputed contractual provision. Further, TCB's claim provides this Court with an enhanced opportunity to define the contours of the collateral order doctrine, since it presents the issue with a clarity lacking in *Desktop*. *See* Pet. at 9.

4. Respondent's reply brief repeatedly mistakes the nature of the collateral order doctrine and misstates the applicable test. Grossman asserts that immediate appeal is unnecessary, because denials of a statute of limitations defense, or a claim

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judicata, TCB had a right to avoid trial which requires immediate review under the collateral order doctrine.

Moreover, the September 23 order was final for all purposes notwithstanding the lack of entry of a separate judgment because the order expressly incorporated the then-pending and legally identical appeal in the Second Circuit of *Welch*. Grossman received effective and expedited appellate review in the *Welch* decision, rendering the dismissal order final for all purposes under *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). *Cf. Axel Johnson*, 6 F.3d at 84 (order final for *res judicata* but not for constitutional purposes where no separate judgment entered; order at issue did not incorporate outcome of pending appeal).

of unconstitutionality, Br. Opp. at 10, or a defense of *res judicata* are "reviewable on an appeal at the end of the case."[4] *Id.* at 12. Of course that is true, but it proves nothing with respect to the applicability of *Cohen*: denials of the defenses of double jeopardy, qualified immunity and absolute immunity can also be raised on appeal after trial and, if found meritorious by the appellate court, will lead to a reversal of the judgment below. However, under the collateral order doctrine rejections of such defenses are subject to immediate review because the central question is not simply whether a defense may be reviewed after trial but whether the right in question is "*effectively* unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (emphasis supplied) (citations omitted). "The third prong of the *Coopers & Lybrand* test is satisfied only where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.' " *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978). Here, TCB's right, based on *res judicata* principles, is a right to avoid trial twice on the same claim. Since that right cannot be effectively vindicated post-trial, review must be immediate.

5. Lastly, Grossman fails to contravene the issue at the heart of TCB's petition: that TCB's right under the doctrine

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[4] In support Grossman cites a number of cases, none of which discusses the collateral order doctrine, and which taken together stand only for the unexceptional proposition that such defenses have been reviewed upon final judgment. Br. Opp. at 10, 12-13. Grossman also suggests that because a defense of *res judicata* is raised as an affirmative defense under Rule 8(c), Fed. R. Civ. P., the collateral order doctrine is inapplicable. However, as pointed out previously, Pet. at 13 n.5, even those defenses which are indisputably subject to immediate appeal, *e.g.*, qualified immunity (*see Mitchell v. Forsyth*, 472 U.S. 511 (1985) (denial of qualified immunity immediately appealable)), are also pleaded as affirmative defenses under Rule 8(c). *See Richardson v. Selsky*, 5 F.3d 616, 619 (2d Cir. 1993) (claim of qualified immunity pleaded as affirmative defense).

of *res judicata* encompasses the right to avoid the burden of further litigation and is therefore at essence a right not to stand trial. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) ("The critical question . . . is whether 'the essence' of the claimed right is a right not to stand trial."). Although Grossman indulges in the misplaced contention that Section 27A creates no such right, Br. Opp. at 11, he cites no case, treatise or other authority in opposition to the principle that the doctrine of *res judicata* creates just such protection.

* * *

Certiorari should be granted to clarify that a *res judicata* right warrants the protection of the collateral order doctrine and that immediate review is necessary to determine if the reinstatement of a claim previously dismissed on the merits with prejudice is appropriate.

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Respectfully submitted,

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